

No. 10775

United States
Circuit Court of Appeals
For the Ninth Circuit.

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JESSIE F. KING and GEORGE C. KING,
Appellants,
VS.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSU-
LATION CO.,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED

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PAUL P. O'BRIEN,
CLERK

No. 10775

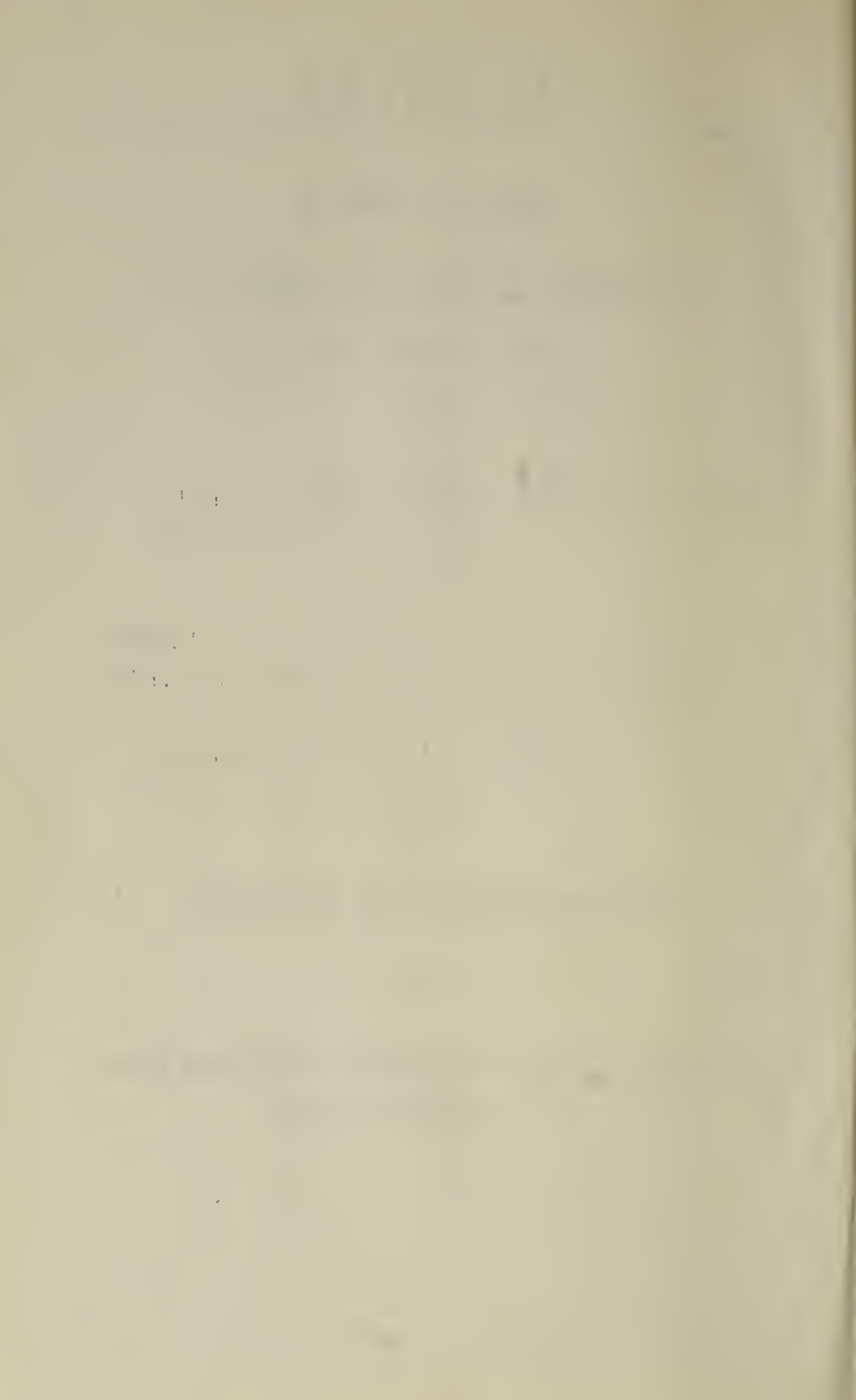
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

CLYDE D. SOUTER, ESQ.,
212-216 Byington Building,
15 West Second Street,
Reno, Nevada,

For the Appellant.

E. F. LUNSFORD, ESQ.; and
BERT GOLDWATER, ESQ.,

409 First National Bank
(Main Office) Building,
Reno, Nevada,

For the Appellee. [1*]

No. 75734

Dept. 1.

In the Second Judicial District Court of the State
of Nevada, In and For the County of Washoe

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
name and/or fictitious name of Yancey Insula-
tion Co.,

Defendant.

COMPLAINT

Come now the Plaintiffs above named, and for
cause of action against the Defendant, allege as
follows:

I.

That at all times and dates herein mentioned,
and for many years, the above-named Plaintiffs
have been, and now are, husband and wife, and at
all times and dates herein mentioned, and for a
long time past have been, and now are, residents
of Reno, Washoe County, Nevada.

II.

That at all times and dates herein mentioned
the Defendant, J. H. Yancey, resided, and still
resides, at 817-25th Street, Sacramento, California,
and did transact business under the firm and/or
[2] fictitious name of Yancey Insulation Co., at
817 East 4th Street, in the City of Reno, County

of Washoe, State of Nevada; and that at said address said Defendant carried on a general business of the insulation of building structures, and some related lines and business.

III.

That at all of the times and dates hereinafter mentioned, and for a considerable time before, the said George C. King, one of the Plaintiffs above named, was regularly employed by the Defendant, J. H. Yancey, to solicit business for the said Defendant, and particularly the business of insulating building structures of all kinds and descriptions; that in the regular course of his employment, he worked out of the business house or place where the business of the Defendant was conducted, at 817 East 4th Street, Reno, Nevada, reporting there, arranging his material and using said building where said business was conducted, as aforesaid, at all times when not actually in the field soliciting business; and that the said George C. King, in the regular course of his employment, had a key to the main entrance of said building where said business was conducted by the Defendant, as aforesaid, and in the regular course of his service and employment by the Defendant, entered said building at all times and all hours and on all days for the purpose of facilitating and carrying on his employment under the terms thereof.

That on or about Sunday, July 19, 1942, the said George C. King, in the regular course of his em-

ployment, made preparations to call upon a prospective customer of [3] the Defendant for an insulation job at Bridgeport, California, on the following day, and said preparations were as follows: The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the Plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.

That the said Plaintiff, Jessie F. King, consented to, and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that in pursuance of the carrying out by said George C. King of the requirements of his employment by the Defendant, the said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned.

That said George C. King stopped his automobile in front of the main entrance of Defendant's business building aforesaid, and entered said building, the said Plaintiff, Jessie F. King, remaining in the car; that a short time later the said George

C. King came out of said building to the car and stated to the Plaintiff, Jessie F. King, that the trip to the first point of stoppage en [4] route to Bridgeport, California, would be a long trip, said George C. King planning to go by way of Lake Tahoe, that facilities in which one could perform the exigencies of nature would not be easily available for a long period of time, and suggested that the said Plaintiff, Jessie F. King, come in the building and use the toilet before starting on the journey; thereupon Plaintiff, Jessie F. King, said that it was not at that time necessary, and said George C. King returned into the business building of the Defendant, but within a few moments Plaintiff, Jessie F. King, left the automobile and herself went into the business building of the Defendant and stated that she had decided that it would be necessary and advisable to use the toilet facilities in the Defendant's establishment before commencing the journey.

That Defendant's business building consisted of a one-story structure approximately twenty-five (25) feet in width, facing upon East 4th Street in Reno, Nevada, and approximately seventy-five (75) feet in length; that the main entrance to said building was a door located in the center of the building; that when one entered that door, about ten (10) or fifteen (15) feet from the door a partition was across the entire width of the building; that approximately in the center of said partition, or somewhat to the left of center as one faces it from the street entrance, an opening or doorway

without a door being hung in place was in said partition; that some three (3) or four (4) feet behind this opening a screen, approximately the same with as the opening, was in place so that one passing through the opening was required to [5] turn to the left and then to the right in order to enter the rear portion of the building; and that as one turned to the right he was within approximately ten (10) or twelve (12) feet of the west or lefthand wall as one approached from the main entrance.

That upon the said Plaintiff, Jessie F. King, stating that she desired to use the toilet facilities, as she was requested to do by said George C. King, the said George C. King, who at that time, with the said Plaintiff, Jessie F. King, was in the front office section of the building, and between the partition and the street, turned toward the open place in the partition, and pointing in that direction said, "You will find the toilet in there: The door is partly open"; that thereupon Plaintiff, Jessie F. King, went through the opening in the partition, turned to the left to avoid the screen, and turned to the right; almost directly before her, at a distance of approximately twenty (20) feet, more or less, appeared a door, partly open, hanging in a wall which came out of the main west wall some two (2) feet wider than the door, and then ran northerly to the north wall of the main structure; that said door was the only door which could be seen by a person entering said rear portion of Defendant's business building as the Plain-

tiff, Jessie F. King, was required to enter said rear portion of said building.

That the partition, heretofore mentioned, across from the west to the eastern wall of Defendant's business building, was a high partition, rising to within a few feet of the ceiling, and the screen north of the opening in this partition heretofore referred to was a [6] high screen but not quite as high as the partition itself; that the Defendant had been using the rear room for showing moving pictures of insulation jobs, and the only two windows in the rear portion of said building were covered with a black paper which shut out all light from entering the back room; that the available light in the back room was that which came from the street side of the building, which was almost all glass, there being two large windows on each side of the door and the door having a glass panel, and which found its way into the rear room over the top of the partition; that although the light was poor, the Plaintiff, Jessie F. King, could see the open door reasonably clearly; that said door was hinged on the west side and opened out toward the south; that said Plaintiff, Jessie F. King, approached said door, took the knob or handle of the door in her left hand, opened the door with her left hand, and as she did so the light from the front windows coming over the partition lighted the top portion of the structure into which the door entered, and the Plaintiff, Jessie F. King, saw the walls, and, relying upon the directions which had been given to her by said George C.

King, stepped forward into the small structure, believing it to be the toilet; that as Plaintiff, Jessie F. King, stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs and the sudden stepping down the first step, which was almost immediately behind the door, threw the Plaintiff, Jessie F. King, off her balance, and she was catapulted down a long flight of stairs to the cellar of said building; that there was no warning sign on said door [7] of any kind or character, or any sign at all; that there was no rail, chain or other protective device of any kind or character to prevent a person from falling down the said stairway, and no precaution of any kind, character or description was provided by the Defendant either to warn a person of the dangerous character of the stairway, dropping as it did almost immediately from behind the door; that there was no light or other device of any kind or character to show the presence of the dangerous conditions, as above described; that Defendant had been put on notice before Sunday, July 19, 1942, by other persons almost falling down said stairway; and that said stairway in the condition in which it existed was dangerous and a menace to persons rightly in said building and using the facilities thereof.

That as Plaintiff, Jessie F. King, entered the rear portion of Defendant's business building, as aforesaid, it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the

stairway, and entered by a door on the sidewall of the structure in which the stairway was located, which said door opened inwardly and could not therefore protrude or be visible to the Plaintiff, Jessie F. King.

IV.

Plaintiffs allege that the Defendant, J. H. Yancey, was negligent and careless in the following manner:

1. In maintaining a dangerous stairway, as heretofore described, in the premises of [8] the Defendant.

2. In failing to have, keep and maintain any guardrail or other means of preventing persons from falling down said stairs.

3. In failing to maintain a light in said stairway area, so that one entering the doorway thereto could see the dangerous and open stairway.

4. In failing to maintain any sign or other warning to indicate the dangerous character of said stairway.

5. In failing to maintain any sign or other warning to indicate that said door lead to a stairway.

6. In failing to warn said Plaintiff, Jessie F. King, of the existence of said dangerous stairway.

7. In failing to properly instruct the said Plaintiff, Jessie F. King, as to the location of the toilet in said premises, and in permitting her, because of the failure of proper instructions, to enter the door to the stairway instead of entering the door to the toilet, which latter door could not be seen by the Plaintiff, Jessie F. King, in entering the said rear portion of Defendant's business building.

8. In failing to keep said premises of the Defendant in a reasonably safe condition so that those invited to enter therein would [9] not be unnecessarily exposed to danger.

9. For maintaining a dangerous stairway without a platform of reasonable width before the first and top step of said stairway.

10. In failing to exercise due and reasonable care for the safety of the Plaintiff, Jessie F. King, after she was invited to enter the premises of the Defendant.

V.

That solely by reason of, and as a direct and proximate result of, the negligence and carelessness of the Defendant, the Plaintiff, Jessie F. King, was severely injured; that the said Plaintiff, Jessie F. King, suffered a fracture of the left os calcis; that the said os calcis was comminuted and flattening and distortion of the tuber angle and some lateral separation of the comminuted fragments; that Plaintiff, Jessie F. King, struck her head, in the fall down the stairway, and was knocked unconscious; that the Plaintiff, Jessie F. King, also suffered a separation of the left sterno-clavicular joint; that the left side of the body of the Plaintiff, Jessie F. King, was badly bruised; that said Jessie F. King was taken immediately to the hospital, and that after ten days of preliminary treatment, during which reduction was attempted to improve the lateral separation of the fragments, without success, there being a marked disability of the sub-astragaloid joint, the injured foot of

the Plaintiff, Jessie F. King, was put in a cast, which said Plaintiff was required to wear for a period of two months; that since said accident and injuries, Plaintiff, Jessie F. King [10] has suffered, and continues to suffer, great and severe pain in her head, her side, and in the injured foot; that said Plaintiff, Jessie F. King, is not able to walk upon said left foot, and is, and will remain, permanently injured and crippled for the rest of her life; that Plaintiff's said injuries, as aforesaid, and the medical treatment which it was necessary for her to undergo, in her attempts to be cured of said injuries, have caused said Plaintiff, Jessie F. King, to suffer extreme pain, nervous shock and mental anguish, and have caused, and still continue to cause, said Plaintiff, Jessie F. King, great bodily discomfiture and pain, and Plaintiff, Jessie F. King, is informed and believes that in the future she will continue to suffer pain and nervous shock and irritation, as a direct result of her said injuries; that as a result of the severe, intense and agonizing physical and mental pain suffered by the Plaintiff, Jessie F. King, the said Plaintiff is injured in health and constitution, weakened in body and mind, and permanently disabled, so that she will be unable to enjoy the ordinary pleasures of life experienced by others, and has, does now, and will continue to suffer great and grievous mental agony and anguish because of her permanent disability, all to the damage of Plaintiff, Jessie F. King, in the sum of Twenty Thousand Dollars (\$20,000.00).

Wherefore, Plaintiffs pray damages in the sum of Twenty Thousand Dollars (\$20,000.00) in their favor and against the Defendant herein, together with costs of suit.

CLYDE D. SOUTER

Attorney for Plaintiffs [11]

State of Nevada,
County of Washoe—ss.

Jessie F. King and George C. King, being first duly sworn, depose and say:

That they are the Plaintiffs in the above-entitled action; that they have read the foregoing complaint and they know the contents thereof; that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

JESSIE F. KING

GEORGE C. KING

Subscribed and sworn to before me this 29th day of March, 1943.

[Seal]

FRANCES M. SCOTT

Notary Public in and for the County of Washoe,
State of Nevada.

My Commission Expires Sept 25, 1943.

[Endorsed]: Filed May 25, 1943. E. H. Beemer,
Clerk, By V. Whitehead, Deputy.

[Endorsed]: No. 302. U. S. Dist. Court, Dist.
Nevada. Filed Aug. 19th, 1943. O. E. Benham,
Clerk. [12]

[Title of Court and Cause.]

SUMMONS

The State of Nevada Sends Greetings to the Said
Defendant:

You are hereby summoned to appear within ten day after the service upon you of this Summons if served in said county, or within twenty days if served out of said county but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

Dated this 25th day of May, A. D. 1943.

[Seal]

E. H. BEEMER

Clerk of the Second Judicial District Court of the
State of Nevada, in and for Washoe County.

By V. WHITEHEAD,

Deputy

CLYDE D. SOUTER,

15 W. 2nd St., Reno, Nevada.

Attorney for Plaintiff

SHERIFF'S RETURN

State of Nevada

County of Washoe—ss.

I hereby certify and return that I received the within Summons on the day of, A. D. 194..., and that I personally served the same upon the within named defendant by showing the original summons to and delivering to a copy of the same, in Washoe

County, State of Nevada, on the day of
, A. D. 194....., and I further re-
 turn that I delivered to the said
 a certified copy of the Complaint in said within
 entitled action, with a copy of the Summons at-
 tached, at the same time and place. [13]

Dated this day of,
 A. D. 194.....

.....
 Sheriff of Washoe County,
 Nevada.

By
 Deputy Sheriff

[Endorsed]: Filed July 13, 1943. E. H. Beemer,
 Clerk. By M. Jensen, Deputy.

[Endorsed]: No. 302. U. S. Dist. Court, Dist.
 Nevada. Filed Aug. 19th, 1943. O. E. Benham,
 Clerk. [14]

SHERIFF'S OFFICE

State of Nevada
 County of Washoe—ss.

I hereby certify and return that I received the
 within Summons on the 25th day of May, A. D.
 1943, and that I personally served the same upon
 the within named defendant J. H. Yancy by show-
 ing the original Summons to him and delivering
 to him a copy of the same, in Washoe County,
 State of Nevada, on the 12th day of July, A. D.

1943, and I further return that I delivered to the said J. H. Yancy a certified copy of the complaint in said within entitled action, with a copy of the Summons attached at the same time and place.

Dated this 13th day of July, A. D. 1943.

RAY J. ROOT

Sheriff of Washoe County,
State of Nevada.

By FRANCIS A. MORTENSEN,
Deputy [15]

In the District Court of the United States,
In and for the District of Nevada

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSULA-
TION CO.,

Defendant.

MOTION TO DISMISS

The defendant moves the Court as follows:
To dismiss the above action because the com-

plaint fails to state a claim against defendant upon which relief can be granted.

E. F. LUNSFORD, and

BERT GOLDWATER

Attorney for Defendant

Address: 409 First National Bank (Main Office) Building, Reno, Nevada.

NOTICE OF MOTION

To Jessie F. King and George C. King, above plaintiffs, and Clyde D. Souther, Esq., Attorney for said plaintiffs:

Please Take Notice that the undersigned will bring the above Motion on for hearing before this Court at the Court Room of said Court, Post Office Building, Carson City, Nevada, [16] on the 30th day of August, 1943, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

E. F. LUNSFORD, and

BERT GOLDWATER

Attorneys for Defendant

Address: 409 First National Bank (Main Office) Building, Reno, Nevada.

Service of the above and foregoing Motion to Dismiss and Notice of Motion, by copy, is hereby admitted this 20th day of August, 1943.

CLYDE D. SOUTER

Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 21, 1943. O. E. Benham Clerk. By M. R. Grubic, Deputy.

In the District Court of the United States of
America, In and For the District of Nevada

No. 302

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSULA-
TION CO.,

Defendant.

OPINION AND DECISION

Norcross, District Judge.

This is a case removed from the State District Court of Washoe County. Plaintiffs are husband and wife. Defendant is a resident of Sacramento, California, engaged in carrying on a general business of the insulation of building structures and, for that purpose, maintains a business office and center in a building located in Reno, Nevada. Plaintiff,

George C. King, was employed as a salesman by defendant. The prayer of plaintiff's complaint is for a judgment for damages for alleged personal injuries, sustained by Plaintiff, Jessie F. King, while within defendant's said building, in the sum of Twenty Thousand Dollars. To plaintiff's complaint, defendant has interposed a motion to dismiss upon the ground that "the complaint fails to state a claim against defendant upon which relief can be granted." The motion to dismiss has been submitted upon briefs filed.

The allegations of fact appearing in the complaint which appear to be controlling of the question of law presented [18] upon the motion are the following:

"* * * that at said address said defendant carried on a general business of the insulation of building structures, and same related lines of business. * * * That * * * the said George C. King, * * * was regularly employed by the Defendant, J. H. Yancey, to solicit business for the said Defendant, and particularly the business of insulating building structures * * * ; that in the regular course of his employment, he worked out of the business house or place where the business of the Defendant was conducted, * * *, reporting there, arranging his material and using said building * * *, at all times when not actually in the field soliciting business; and that * * *, in the regular course of his employment, had a key to the main entrance of said building where said business was conducted * * *, and in the regular course of his service and employment

by Defendant, entered said building at all times and all hours and on all days for the purpose of facilitating and carrying on his employment under the terms thereof.

“That on or about Sunday, July 19, 1942, the said George C. King, in the regular course of his employment, made preparations to call upon a prospective customer of the Defendant for an insulation job at Bridgeport, California, on the following day, and said preparations were as follows: The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.

“That the said Plaintiff, Jessie F. King, consented to, and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that * * * said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned.

“That said George C. King stopped his automobile in front of the main entrance of Defendant’s

business building aforesaid, and entered said building, the said Plaintiff, Jessie F. King, remaining in the car; that a short time later the said George C. King came out of said building to the car and stated to the Plaintiff, Jessie F. King, that the trip to the first point of stoppage en route to Bridgeport, California, would be a long trip, said George C. King planning to go by way of Lake Tahoe, that facilities in which one could perform the exigencies of nature would not be easily available for a long period of time, and suggested [19] that the said Plaintiff, Jessie F. King, come in the building and use the toilet before starting on the journey; thereupon Plaintiff, Jessie F. King, said that it was not at that time necessary, and said George C. King returned into the business building of the Defendant, but within a few moments Plaintiff Jessie F. King, left the automobile and herself went into the business building of the Defendant and stated that she had decided that it would be necessary and advisable to use the toilet facilities in the Defendant's establishment before commencing the journey.

“That Defendant's business building consisted of a one-story structure approximately twenty-five (25) feet in width, * * * and approximately seventy-five (75) feet in length; that the main entrance * * * was a door located in the center of the building; that when one entered that door, about ten (10) or fifteen (15) feet from the door a partition was across the entire width of the building; that approximately in the center of said partition, * * * an opening * * * was in said partition; that some three (3) or

four (4) feet behind this opening a screen, approximately the same width as the opening, was in place so that one passing through the opening was required to turn to the left and then to the right in order to enter the rear portion of the building; and that as one turned to the right he was within approximately ten (10) or twelve (12) feet of the west or lefthand wall as one approached from the main entrance.

“That upon the said Plaintiff, Jessie F. King, stating that she desired to use the toilet facilities, as she was requested to do by said George C. King, the George C. King, who at that time, with the said Plaintiff, Jessie F. King, was in the front office section of the building, * * * turned toward the open place in the partition, and pointing in that direction said, “You will find the toilet in there. The door is partly open”; that thereupon Plaintiff, Jessie F. King, went through the opening in the partition, turned to the left to avoid the screen, and turned to the right; almost directly before her, at a distance of approximately (20) feet, more or less, appeared a door, partly open, hanging in a wall which came out of the main west wall some two (2) feet wider than the door, and then ran northerly to the north wall of the main structure; that said door was the only door which could be seen by a person entering said rear portion of Defendant’s business building as the plaintiff, Jessie F. King, was required to enter said rear portion of said building.

“That the partition, * * * across from the west to the eastern wall * * * was high partition, rising

to within a few feet of the ceiling, and the screen north of the opening in this partition * * * was a high screen but not quite as high as the partition itself; that the Defendant had been using the rear room for showing moving pictures of insulation [20] jobs and the only two windows in the rear portion of said building were covered with a black paper which shut out all light from entering the back room; that the available light in the back room was that which came from the street side of the building, which was almost all glass, * * * and which found its way into the rear room over the top of the partition; that although the light was poor, the Plaintiff, Jessie F. King, could see the open door reasonably clearly; that said door was hinged on the west side and opened out toward the south; that said Plaintiff, Jessie F. King, approached said door, * * * opened the door with her left hand, and as she did so the light from the front windows coming over the partition lighted the top portion of the structure into which the door entered, and the Plaintiff, Jessie F. King, saw the walls, and, relying upon the directions which had been given to her by said George C. King, stepped forward into the small structure, believing it to be the toilet; that as Plaintiff, Jessie F. King, stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs and the sudden stepping down the first step, * * * threw the Plaintiff, Jessie F. King, off balance, and she was catapulted down a long flight of stairs to the cellar of said building;

* * * that said stairway in the condition in which it existed was dangerous * * *.

“That as Plaintiff, Jessie F. King, entered the rear portion of * * * building, * * * it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the stairway, and entered by a door on the sidewall of the structure in which the stairway was located, which said door opened inwardly * * *.”

The questions of law presented upon the motion to dismiss, are whether, upon the facts alleged, Plaintiff, Jessie King, at the time of her injury, was in the status of an invitee or that of a mere licensee, and any liability which may depend upon such respective status. Plaintiff, George King, was neither owner or occupant of the premises. An occupant, as that term is used in cases of this character, means one in possession by authority of the owner such as, for example, a lessee or tenant. An owner or occupant may be liable for an injury to an invitee or licensee where such owner or occupant is represented by an employee acting within the scope of his authority when in charge of the premises. In this case the scope of employment of the plaintiff, George King, as a sales- [21] man with right to enter thereon for purposes of such services, gave him no authority over the premises, such as would classify his wife, under the facts alleged, as an invitee. Assuming Plaintiff, Jessie King, to have had the status of a licensee, the law governing such status, would give Plaintiffs no right of recovery for injuries sus-

tained in accordance with the facts as alleged. *Nevada T. & W. Co. v. Peterson*, 60 Nev. 87, 38 P. (2d) 8; *Babcock & Wilcox v. Nolton*, 58 Nev. 133, 71 Pac. (2d) 1051. In the opinion in the *Babcock* case, *supra*, appears the following:

“In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it.”

It is well settled as a matter of law that Plaintiffs have no right of recovery against the Defendant, owner of the property, upon the facts as alleged, either upon the status of Plaintiff, *Jessie King*, being that of an invitee or a licensee. *Seavy v. I.X.L. Laundry*, 60 Nev. 324, 333, 108 Pac. (2d) 853; *Kneiser v. Belasco Co.*, 133 Pac. 989; *Garthe v. Rupport*, 190 N.E. 643; *Standard Oil Co. v. Heninger*, 196 N.E. 706, 709; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L.R.A. 580; *McNamara v. McLean*, 19 N.E. (2d) 544; *McMullen v. M. and M. Oil Co.*, 290 N.W. 3; 45 C.J. 796, par. 201; 38 Am. Jr. 767 par. 105; *Redfield on Negligence Vol. 2*, par. 705.

In the brief for Plaintiffs appears a map of the ground floor of Defendant's business building. It shows that the entrance to the stairway to the basement and the entrance to the toilet are located near each other on the west side of the building in adjoining spaces, constructed for such respective purposes, the toilet room being in the extreme north-

west corner of the floor space just beyond and adjoining the stairway por- [22] tion. The door to the stairway is shown to open outwards to the south and that of the toilet to open inwards to the west. It is clear from the map that a stranger to the floor space of the building, upon inquiring from one in the main office, of the location of the toilet and that such person turning "toward the open place in the partition, and pointing in that direction said, 'You will find the toilet in there. The door is partly open,' " and thereupon such stranger entering the larger room space to the north of the partition, might probably become confused upon such entrance when but one door space would appear in view, no mention having been made of the presence of two doors or the precise or approximate location of the toilet door.

Conceding such statement to constitute negligence which occasioned the accident and injury, the Plaintiff husband's employment by defendant was not of the character which would make the defendant, in law, liable for such negligence and, hence, subject to a judgment for damages therefor in favor of both husband and wife upon a community property law relationship or in favor of either of them.

It is the conclusion of the Court that the motion to dismiss should be sustained.

It is so ordered.

Dated this 14th day of January, 1944.

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed Jan. 14, 1944. [23]

[Title of District Court and Cause.]

RECORD OF NOTATION ON DOCKET

Jan. 14, 1944. Judgment of Dismissal entered this day. [24]

Filed April 14th, 1944.

O. E. BENHAM, Clerk,
By O. F. PRATT, Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Jessie F. King and George C. King, Plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above-entitled Court dismissing Plaintiffs' action, as per the opinion and decision of said Court reading as follows:

"It is the conclusion of the Court that the motion to dismiss should be sustained. It is so ordered."

followed by notation in the docket of the above-entitled case reading as follows:

"Judgment of dismissal entered this day (January 14, 1944)." [25]

both being entered in this action on the fourteenth day of January, 1944.

CLYDE D. SOUTER

Attorney for Appellants, Jes-
sie F. King and George C.
King

Address: 212-216 Byington Building,
15 West 2nd Street,
Reno, Washoe County, Nevada.

[Endorsed]: Filed April 14, 1944. [26]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that Columbia Casualty Company, a New York Corporation, having an office and place of business in the City, County and State of New York, is held and firmly bound unto the above-named J. H. Yancey in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said J. H. Yancey for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Whereas, on the 14th day of January, 1944, a judgment was entered in the above-entitled proceeding;

And the Appellants, Jessie F. King and George C. King, feeling aggrieved thereby, appeal to the United [27] States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, the Condition of This Obligation Is Such, that if the aforesaid judgment is affirmed or modified by the appellate court or if the appeal is dismissed, the Appellants, Jessie F. King and George C. King, will pay all costs which may be awarded against them on said appeal.

Dated, Reno, Nevada, this 11th day of April, 1944.

COLUMBIA CASUALTY
COMPANY

[Seal] By J. V. CORICA
Attorney in Fact

Sealed and countersigned at Reno, Washoe County, Nevada, this 11th day of April, 1944.

By J. V. CORICA
Attorney in Fact. [28]

State of Nevada,
County of Washoe—ss.

On this 11th day of April, in the year 1944, before me, Dorothy Gault, a Notary Public in and for said County and State, personally appeared J. V. Corica, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the Columbia Casualty Company, and acknowledged to me that he subscribed the name of the Columbia Casualty Company thereto as principal, and his own name as Attorney-in-Fact.

[Seal] DOROTHY GAULT
Notary Public in and for said
County and State.

My commission expires November 28, 1944.

[Endorsed]: Filed April 14, 1944. [29]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFFS-APPELLANTS INTEND TO
RELY ON APPEAL

The Plaintiffs-Appellants above named, having filed their notice of appeal from the Judgment in favor of the Defendant-Appellee made and entered in the above-entitled cause on the fourteenth day of January, 1944, hereby make their statement of points upon which they intend to rely on said appeal:—

1. Federal Courts will follow state statutes and decisions in state where Court is sitting in all cases except as provided by United States Constitution or Acts of Congress. The Court erred in failing to follow this principle.

2. Under Conformity Act, 28 U. S. C. A., Section 724, Federal Courts will follow practice authorized by state statutes if there be nothing in statutes that is incongruous with court's organization or fundamental [32] procedure or in conflict with constitutional enactment. The Court erred in failing to approve practice authorized by statutes of the State of Nevada.

3. In an action for personal injuries Federal Courts will follow the determination by the highest appellate court of the state in which the action is tried as determining the degree of care required by the Defendant, unless contrary to Federal law or decisions. The Court erred in refusing to adopt the rule of liability established by the highest ap-

pellate court in the State of Nevada, to-wit, the Nevada Supreme Court.

4. The Court erred in refusing to leave to determination of a jury the degree of negligence of the Defendant where gross negligence would make the Defendant liable under the Court's own opinion and decision.

5. The Court erred in determining that George C. King, as the servant of the Defendant, lacked the necessary authority to invite Plaintiff, Jessie F. King, upon the premises of the Defendant.

6. The Court erred in finding that Plaintiff, Jessie F. King, was not an invitee of the Defendant, J. H. Yancey, in the premises of the Defendant.

7. The Court erred in holding that Plaintiff, Jessie F. King, was not an express invitee of the Defendant, J. H. Yancey.

8. The Court erred in holding that Jessie F. King, under the law of master and servant, taking into consideration the facts that George C. King was employed as a salesman by Defendant, had the right to use the premises at all times, had a key thereto, was actually [33] there to prepare his materials for a trip on behalf of his master, the Defendant, and was being aided in prosecuting that trip by the presence of his wife, was not entitled to rely upon the authority of George C. King to invite her into the premises for the purpose for which she entered, and that Defendant was not liable.

9. The Court erred in holding that even if Plaintiff, Jessie F. King, at the time of her injury, was not engaged in something for the benefit of the Defendant, or which his employee, George C. King, believed was for the benefit of the Defendant, under such circumstances she did not become an invitee by implication, and that Defendant was not liable.

10. The Court erred in holding that even if the Plaintiff, Jessie F. King, was a mere licensee and her presence in the premises was known to George C. King, the Defendant's servant, he having expressly invited her to enter for a particular purpose, the master and his servants using the premises were not under obligation to thereafter exercise reasonable care, and that the conduct of George C. King was not wantonly negligent, and that the Defendant was not liable.

11. The Court erred in holding that even if Plaintiff, Jessie F. King, were considered in the worst possible status, to-wit, as a trespasser, the master, the Defendant, would not be liable for the wanton negligence of his servant perpetrated upon her.

12. The Court erred in arriving at a construction of the term "express invitee" as it is known in the law. [34]

13. The Court erred in refusing to apply the general principle of the law of agency that the principal is bound by the act of his agent which falls within the apparent scope of the authority of the agent, and that the principal will not be per-

mitted to deny the authority of his agent against innocent third parties who have dealt with such agent in good faith.

14. The Court erred in determining the meaning of the apparent authority of a servant to bind his master, as that term is understood in the law.

15. The Court erred in refusing to recognize the doctrine of respondent superior, and that such doctrine is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.

16. The Court erred in refusing to recognize the principle of law that an act is within the "course of employment" if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or illadvisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

17. The Court erred in refusing to be bound by [35] the presumption that exists that, when the servant is engaged in the performance of his master's business, he is acting within the scope of his employment.

18. The Court erred in refusing to enforce the principle of law that the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer.

19. The Court erred in holding that an invitation is not implied where the entry on the premises of the Defendant is beneficial to the owner.

20. The Court erred in holding that there is no duty to use ordinary care for a licensee on the premises of the Defendant once her presence had become known to the master or his servant.

21. The Court erred in refusing to hold that the affirmative acts of Defendant's employee constituted such wanton conduct as would make Defendant liable for injuries to Plaintiff, Jessie F. King, not only as a licensee but even as a trespasser.

22. The Court erred in refusing to hold that Jessie F. King, under the law of master and servant, in view of the facts set forth in Plaintiffs' complaint, was entitled to rely upon the apparent authority of George C. King, the Defendant's servant, to invite her into Defendant's premises, and that she was therefore an express invitee under the circumstances, and that Defendant was liable.

23. The Court erred in refusing to hold that even if George C. King, Defendant's servant, was acting [36] outside the scope of his authority or implied authority, the said Jessie F. King, according to the express wishes of George C. King, his servant, who believed that his request was for the

benefit of the Defendant, became an invitee by implication, and that Defendant was liable.

24. The Court erred in refusing to hold that even if the Plaintiff, Jessie F. King, should be considered a mere licensee, her presence in the premises was known to George C. King, Defendant's servant, he having expressly invited her to enter, and the master and his servants under such circumstances were required to exercise reasonable care, which was not exercised, and Defendant was therefore liable.

25. That the decision and judgment of the Court are each against law.

26. That the constitutional rights of the Plaintiffs-Appellants under the Constitution of the United States are not recognized and enforced by the judgment of the United States District Court for the District of Nevada, but the result thereof is to deprive the Plaintiffs-Appellants of said rights.

CLYDE D. SOUTER,

Attorney for Plaintiff-Appellants,
Jessie F. King and
George C. King.

Address: 212-216 Byington Building, 15 West 2nd
Street, Reno, Nevada.

Service of a true copy of the foregoing statement
of points on which Plaintiffs-Appellants intend to

rely on appeal is hereby admitted this 26 day of April, 1944.

E. F. LUNSFORD, and
BERT GOLDWATER,

Attorneys for Defendant-Appellee, J. H. Yancey.

[Endorsed]: Filed April 28, 1944. [37]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT

United States of America,
District of Nevada.—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of Jessie F. King and George C. King, Plaintiffs, vs. J. H. Yancey, doing business under the firm and/or fictitious name of Yancey Insulation Co., Defendant, said case being No. 302 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 39 typewritten pages numbered from 1 to 39, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorse-

ments of filing thereon, as set forth in appellants' "Designation of Contents of Record on Appeal", filed in said case and made a part of the transcript attached hereto, as the same appear from the originals [38] of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

And I further certify that the cost of preparing and certifying to said record, amounting to \$8.35, has been paid to me by Clyde D. Souther, Esq., attorney for the appellants herein.

Witness my hand and the seal of said United States District Court this 13th day of May, 1944.

[Seal]

O. E. BENHAM,

Clerk, U. S. District Court. [39]

[Endorsed]: No. 10775. United States Circuit Court of Appeals for the Ninth Circuit. Jessie F. King and George C. King, Appellants, vs. J. H. Yancey, doing business under the firm and/or fictitious name of Yancey Insulation Co., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed May 15, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10775

JESSIE F. KING and GEORGE C. KING,
Appellants,
vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSU-
LATION CO.,

Appellee.

Upon Appeal From the District Court of the
United States for the District of Nevada

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To J. H. Yancey, doing business under the firm
and/or fictitious name of Yancey Insulation Co.,
Appellee in the above-entitled cause, and to E. F.
Lunsford, Esquire and Bert Goldwater, Esquire,
attorneys for said Appellee:

Please take notice that, as required by the rules
of this Court, Appellants in the above-entitled
cause do hereby designate the following portions of
the records and proceedings to be contained in the
record on appeal in the above-entitled cause, to-wit:

1. Complete summons in said action.
2. Appellants' complete complaint.
3. Appellee's complete motion to dismiss.
4. Opinion and Decision of Honorable Frank H.

Norcross, Judge of the District Court of the United States, in and for the District of Nevada.

5. Record of notation entered on the records of the United States District Court for the District of Nevada, to-wit: "Judgment of dismissal entered this day."

6. Notice of Appeal.

7. Bond for costs on appeal.

8. This Designation of contents of record on appeal.

9. Statement of points on which Appellants intend to rely on appeal.

CLYDE D. SOUTER,

Attorney for Appellants,
Jessie F. King and George
C. King.

Address: 212-216 Byington Building, 15 West 2nd
Street, Reno, Nevada.

Service of a true copy of the foregoing designation of contents of record on appeal is hereby admitted this 5th day of May, 1944.

E. F. LUNSFORD, and
BERT GOLDWATER,

Attorneys for Appellee, J. H.
Yancey.

[Endorsed]: Filed May 15, 1944. Paul P.
O'Brien, Clerk.